certainly make compliance easier (and in some situations may ultimately be necessary to prevent burdening interstate commerce through compliance complexity), in general it is good for the economy and the citizens of each state to choose independently what type of tax system they will have. Without this choice, states will be left at a disadvantage in attracting the types of jobs and industry necessary for the state and its citizens to thrive.

The United States is a large and diverse country. Each state has unique advantages and disadvantages that contribute to its overall economy and success. The differences among the states include geographic, population, and historical growth patterns, etc. Some states, like Florida and California, are blessed with nice weather and lovely beaches. Other states, like Ohio, get sleet. Some states, like Texas and Alaska, have valuable natural resources (oil) that they can exploit financially. Other states, like Ohio, do not. It is this variety in economies, natural resources, and population that create unique burdens and opportunities for each state financially. Part of this financial burden *or* opportunity lies within the choices a state's elected officials make with regard to the tax code.

Perhaps all people and businesses would move to Florida if they could. However, that would be bad for Ohio and bad for our country as a whole as it would put pressure on Florida's existing infrastructure while wasting the land and existing infrastructure of Ohio. Thus, Ohio, among other things, can choose to use its tax code to compete with Florida's beaches. Florida may have sand—but Ohio has valuable investment tax credits.

Similarly, each state may have different needs as far as the type of jobs its citizens are qualified for. Some states, due to historical patterns, may have an unskilled workforce. Such a state may want to attract either businesses that will employ unskilled laborers or provide on-the job training to increase

the skill level. Other states may have an extremely technically advanced population and would find little use in low-skilled jobs. By allowing each state to tailor its tax system to meet the needs of its populace, our federalist system allocates precious resources across the states based on the uniqueness of that state. The perfect tax system for Florida may not be the perfect (or even possible) tax system for Ohio. The Sixth Circuit's decision however, essentially finds that such unique tailoring on a state by state basis is discriminatory because it could foreclose tax neutral decisions.

Taking the Sixth Circuit's reasoning at face value, many common tax systems, not just the incentives at issue here, would clearly be unconstitutional. For example, several states over the years have chosen to move from apportioning the income of a multistate corporate taxpayer based on the percentage of that taxpayer's property, payroll and sales in the taxing state to only using a single factor—sales—to determine the percentage of income taxable in this state. Many businesses, when considering a new facility location, may find such an apportionment formula attractive because it does not increase the business's tax when it adds a facility and payroll in the state. However, such "tax influenced" decision-making would doom alternatives to the three factor system and ultimately require that all states adopt identical apportionment formulas. The same thing can be said for differences in tax rates (some businesses may choose to locate in states with lower statutory rates) and differences in taxes themselves (some businesses may be attracted to Nevada because it does not impose a corporate income tax). Tax rates, tax types, apportionment formulas, and even what goes into the tax base vary drastically among the states. Under the Sixth Circuit's reasoning, if taxpayers' were to take into account these variations, then all variations would be unconstitutional.

Hence, in order to preserve any type of federalism and state autonomy over the fisc, the Sixth Circuit's sweeping en-

dorsement of the "tax-neutral decision making" theory must be abandoned. Once its limitless scope and the ultimate result of a homogenized state tax system is understood, the Sixth Circuit's rationale falls of its own weight.

CONCLUSION

Because the Sixth Circuit could have chosen a narrower rule in determining whether the Ohio investment tax credit unconstitutionally discriminated against interstate commerce and such a rule would both be consistent with this Court's precedent and would uphold the incentive at issue in this case and similar incentives in the other 45 states imposing a corporate income tax, COST and NAM ask this court to reverse the decision of the Sixth Circuit and hold the Ohio investment tax credits are constitutional.

Respectfully submitted,

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IN THE

Supreme Court of the United States

DAIMLER CHRYSLER CORP.,

Petitioner,

v.

CHARLOTTE CUNO, *et al.*,

Respondents.

WILLIAM W. WILKINS,
TAX COMMISSIONER FOR THE STATE OF OHIO, *et al.*,

Petitioners,

v.

CHARLOTTE CUNO, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* DIRECTV, INC. AND ECHOSTAR SATELLITE L.L.C. IN SUPPORT OF NONE OF THE PARTIES

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Bacchus Imports, Ltd. v. Dias,
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Boston Stock Exchange v. State Tax Comm'n,
429 U.S. 318 (1977) ..... *passim*

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Cited Authorities

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New Energy Co. of Indiana v. Limbach,
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Cited Authorities

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ADDITIONAL AUTHORITIES

Ivan C. Dale, Comment, *Economic Development Incentives, Accountability Legislation and a Double Negative Commerce Clause*, 46 ST. LOUIS U. L.J. 247 (2002) 9

Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377 (1996) 8-9

Clayton P. Gillette, *Business Incentives, Interstate Competition, and the Commerce Clause*, 82 MINN. L. REV. 447 (1997) 8

Walter Hellerstein, *Commerce Clause Restraints on State Tax Incentives*, 82 MINN. L. REV. 413 (1997) 9

INTEREST OF THE *AMICI CURIAE*[1]

DIRECTV, Inc. ("DIRECTV") and EchoStar Satellite L.L.C. ("EchoStar") are the nation's leading satellite television providers. DIRECTV and EchoStar deliver a variety of television programming packages—including hundreds of channels such as CNN, C-SPAN, Discovery, ESPN, HBO, MTV, Showtime, and broadcast stations of the ABC, CBS, Fox, and NBC networks—to their customers by transmitting signals from satellites in orbit above the Earth to satellite dishes mounted on subscribers' homes or businesses. Together, EchoStar and DIRECTV serve more than 26 million subscribers, in every state across the United States.

The central issue to be decided in these cases is whether the dormant Commerce Clause prohibits state and local tax credits designed to attract in-state investment. *Amici* are concerned that, if this issue were to be decided in a manner that is not limited to the facts of these cases, the decision could potentially influence pending Commerce Clause actions *amici* have brought challenging state tax credits and exemptions that are not intended to attract in-state investment, but are classic examples of unconstitutional protectionism.

Since 2002, five states have enacted laws that tax direct broadcast satellite ("DBS") service provided by satellite

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1. In letters lodged with the clerk, the parties have granted blanket consent for the filing of *amicus curiae* briefs. This brief was not authored in whole or in part by counsel for a party to this proceeding, and no person or entity other than the *amici curiae* made a monetary contribution for preparation of this brief.

operators such as DIRECTV and EchoStar, but that, in one form or another, effectively exempt from taxation DBS's fiercest competitors, cable companies who use local cable networks to deliver their service. For example, Ohio adopted a law that taxes the retail sale of DBS television service at 6 percent, but that totally exempts competing cable television service. *See* Ohio Rev. Code §§ 5739.01(B)(3)(q), 5739.01(XX), 5739.02(A)(34), 5741.02. Just this year, North Carolina also adopted a measure that imposes a nominally equal sales tax on both DBS and cable, but that then grants cable companies a credit for the amount of franchise fees they pay to local governments for the use of local rights-of-way. *See* N.C. Session Law 2005-276 §§ 33.4(a), 33.14, *amending* N.C.G.S. 105-164.4(a), *adding new* N.C.G.S. § 105-164.21B.

DIRECTV and EchoStar are challenging the Ohio and North Carolina tax exemptions and credits, as well as similar exemptions and credits in Florida, Kentucky, and Tennessee.[2] These credits and exemptions are classic examples of protectionist discrimination against interstate commerce: They are available only to multi-channel television operators who provide service using in-state cable networks, and are denied to competing satellite television providers who deliver

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2. *See DIRECTV, Inc. v. Florida Dep't of Rev.*, No. 05-CA-1037 (Fla. Cir. Ct., 2nd Judicial Cir., Leon County); *DIRECTV, Inc. v. Treesh*, No. 05-CV-24-KKC (United States Dist. Ct., E.D. Ky.); *DIRECTV, Inc. v. Wilkins*, No. 03CVH06-07135 (Ct. Common Pleas, Franklin County, Ohio); *DIRECTV, Inc. v. Tolson*, No. 5:05-CV-7484-FL(2) (United States Dist. Ct., E.D.N.C.); *DIRECTV, Inc. v. North Carolina*, No. 03 CVS 13324 (N.C. Gen. Ct. of Justice, Sup. Ct. Div., Wake County), *on appeal*, N.C. Ct. App. No. 05-1250; *DIRECTV, Inc. v. Chumley*, No. 03-2408-II (Tenn. Chancery Ct. of Davidson County, 20th Judicial Dist.).

their programming using satellites that are necessarily located out-of-state. As a court in one of these cases held, "Reasonable minds can reach but one conclusion that the differential tax treatment burdens out-of-state economic interests and favors in-state economic interests." *See* Decision and Entry Partially Granting Plaintiffs' Motion for Summary Judgment, *DIRECTV, Inc. v. Wilkins*, No. 03CVH06-7135, slip op. at 15 (Oct. 21, 2005).

DIRECTV and EchoStar have an interest in the cases now before this Court because of their potential effect on *amici's* pending cases. There are significant differences between the Ohio investment tax credit at issue here and the cable television tax credits and exemptions that discriminate against DIRECTV and EchoStar. Among other things, the cable tax credits and exemptions are not intended to attract investment in plant or equipment inside the state but, rather, to offset the cost of the franchise fees cable companies pay to local governments for the use of local rights-of-way. The credits are plainly not an evenhanded attempt to attract investment into the state because satellite operators cannot relocate their satellites from orbit above the Earth into the taxing state. In addition, unlike Ohio's investment tax credit, the state cable credits and exemptions bear the earmarks of classic protectionist taxes that this Court has long condemned—the imposition of a tariff-like barrier to the purchase of products and services from out-of-state sources. Nevertheless, since this Court is considering the constitutionality of state tax credits under the Commerce Clause for the first time since *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1988), it is possible that the decision in these cases, if not carefully circumscribed, may be construed expansively and affect the lower courts' consideration of *amici*'s pending challenges to the cable television credits and exemptions.

DIRECTV and EchoStar neither seek affirmance nor support reversal of the Sixth Circuit's decision. Rather, *amici* wish to provide their views on the distinctions between different types of tax credits, and the implications of these differences for Commerce Clause analysis. This will assist the Court in rendering a decision on the investment tax credits at issue here that will be appropriately limited to the type of investment credits involved in these cases, without altering established jurisprudence governing protectionist tax credit schemes.

SUMMARY OF ARGUMENT

Investment credits differ from traditional discriminatory taxes. Tax credits and exemptions previously found invalid by the Court clearly impact interstate commerce. They directly change the price of ***transactions***. But investment tax credits affect interstate commerce more circuitously. They merely affect the value of a single ***cost input*** into the product or service being sold. Thus, investment tax credits may require a closer scrutiny in order to determine whether their effects rise to the level of impermissible discrimination against interstate commerce.

The first step in assessing a state investment tax incentive is to determine whether the measure is genuinely intended to attract in-state investment. Incentivizing in-state investment pursues the legitimate state purpose of "encourag[ing] the growth and development of intrastate commerce and industry." *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 336 (1977). However, the mere characterization of a tax incentive as intended to attract investment should not be controlling for Commerce Clause purposes. This Court regularly has probed into the actual

purpose behind state taxes and rejected the stated justification if it was a pretext for protectionism.

If a state tax is genuinely intended to attract in-state investment, the next step in Commerce Clause analysis is whether the state is pursuing this legitimate interest by means that do not discriminate against interstate commerce. Tax incentives violate the Commerce Clause when they have the same economic effect as a "protective tariff or customs duty." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 (1994). Investment incentives that take the form of credits from sales taxes or similar transactional taxes operate as such a tariff barrier. They directly discriminate against interstate commerce by increasing the cost of sales to consumers who purchase goods or services from out-of-state vendors. Conversely, credits for investment, such as the Ohio credit in issue in these cases, do not directly affect the sales price of the transaction, and thus may not have an invidious impact on interstate commerce.

ARGUMENT

I. TAX CREDITS AND EXEMPTIONS SHOULD FIRST BE SCRUTINIZED TO DETERMINE IF THERE IS A GENUINE INTENT TO ATTRACT IN-STATE INVESTMENT

This Court repeatedly has emphasized that "finding [whether] state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose or discriminatory effect." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984) (citations omitted). Thus, one of the factors almost always considered by the Court in tax credit cases is whether the state interest

that underlies the credit is protectionist or legitimate. *See, e.g., id.* at 272-73; *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 39 (1980); *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 352 (1976).

In the case of investment tax credits, the purpose of "encourag[ing] the growth and development of intrastate commerce and industry" has long been considered a legitimate one, because competition "for a share of interstate commerce . . . lies at the heart of a free trade policy." *Boston Stock Exch.*, 429 U.S. at 336-37. Conversely, a state interest in protecting local industry from out-of-state competition is never legitimate. Indeed, that is precisely the type of protectionism the dormant Commerce Clause was designed to prevent. *See, e.g., Bacchus*, 468 U.S. at 272; *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981).

Thus, the first step in Commerce Clause analysis of a state incentive scheme is to determine whether it is genuinely intended to promote in-state investment or is a pretext for protectionism. In making this inquiry, the Court has not deferred to the legislature's characterization of its rationale but has instead probed into the actual purpose behind the challenged law where it has a differential impact on in-state and out-of-state economic activity. *See, e.g., Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 675-76 (1981) ("Less deference to the legislative judgment is due, however, where the local regulation bears disproportionately on out-of-state residents and businesses."). "Formulas and catchwords" thus are not controlling in determining the law's actual purpose. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935). The Court accordingly has rejected the "official" rationale for a challenged law where it was a pretext for protectionism. *See, e.g., New Energy Co.*, 486 U.S. at 279-

80 (rejecting health justification for a law whose actual purpose was to protect local producers of ethanol from out-of-state competition); *Kassel*, 450 U.S. at 676-79 (rejecting highway safety rationale because evidence indicated the actual purpose was to discourage interstate truck traffic).

In these cases, there is no dispute that the Ohio investment tax credit was genuinely designed to attract in-state investment, as opposed to protecting in-state commerce from out-of-state competition.

II. TAX CREDITS AND EXEMPTIONS DESIGNED TO ATTRACT IN-STATE INVESTMENT MUST DO SO BY MEANS THAT DO NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE

The fact that a tax credit or exemption is genuinely intended to attract in-state investment does not shield it from further constitutional scrutiny. Although a state may compete with others "for a share of interstate commerce . . . , in the process of competition no State may discriminatorily tax the products manufactured or the business operations performed in any other State." *Boston Stock Exch.*, 429 U.S. at 336-37; *see also Bacchus*, 468 U.S. at 271 (in "encouraging domestic industry, . . . the Commerce Clause stands as a limitation on the means by which a state can constitutionally seek to achieve that goal"). Thus, the second step in Commerce Clause scrutiny of investment incentives is to determine whether the ***means***, not just the ***end***, comport with the Commerce Clause.

In creating tax incentives for in-state investment, there is an important difference between exemptions or credits granted against transactional taxes, such as a sales tax, and